

Claimant settled all issues with respondent on June 23, 1994 and at that time respondent reserved all issues against the Kansas Workers Compensation Fund. In his Award of November 6, 1995 the Administrative Law Judge denied respondent's application to shift liability to the Fund, finding respondent had failed to establish the requisite knowledge of a preexisting impairment. The issue to be considered on appeal is whether all or any portion of the settlement award should be assessed against the Kansas Workers Compensation Fund (Fund). In addition, the Fund argues that the report of Dr. Daniel D. Zimmerman should not be considered part of the record for this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes:

(1) Respondent asks the Appeals Board to consider the report of Dr. Daniel D. Zimmerman dated August 27, 1993. The report was attached to and discussed in respondent's submission letter to the Administrative Law Judge. The record shows no objection by the Fund, except on appeal. The Appeals Board considers the submission letter an inappropriate vehicle for the offering of medical opinions unless stipulated to. To consider the report would, under these circumstances, also contravene requirements in K.S.A. 44-519 for deposition testimony to offer medical opinions. The Appeals Board has not, therefore, considered the report for Dr. Zimmerman as part of the record in this case.

(2) The Award by the Administrative Law Judge should be affirmed. Respondent's request to shift liability to the Kansas Workers Compensation Fund is denied.

K.S.A. 1992 Supp. 44-567 provides that an employer shall be relieved of liability for all or a portion of compensation awarded if: (1) the employer employed or retained the employee with knowledge of preexisting impairment which would constitute a handicap in obtaining or retaining employment, and (2) the injury at issue in the claim would not have occurred but for or was contributed to by that preexisting impairment. The evidence in this case fails to satisfy either of the above two listed criteria.

Claimant first injured the second digit of her right hand in August of 1992 while working for respondent. She sought medical treatment through Dr. Phillip S. Olsen and returned to work. Claimant's condition worsened, extended into her right upper extremity and ultimately into her left upper extremity. Dr. Olsen diagnosed the condition as reflex sympathetic dystrophy.

Respondent seeks to shift the liability for a general body impairment to the Kansas Workers Compensation Fund, asserting that its knowledge of claimant's initial finger injury constituted knowledge of a preexisting impairment. To support its claim, respondent offers the testimony of claimant's supervisor, Carol Evans. After reviewing that testimony the Appeals Board concludes it falls short of establishing the requisite knowledge. Ms. Evans testified that she knew claimant had obtained medical treatment for injury to her finger; knew that upon returning to work after examination by Dr. Olsen claimant had been moved from flag slotting to the sewing department; and knew that claimant was transferred to the sewing department because of the injury to her finger. The evidence does not establish that respondent knew anything additional. The record does not, for example, indicate whether Ms. Evans knew that it was permanent or temporary, knew that change of her

duties would be brief or extended, or whether respondent knew anything about the progression of the injury to the extremities. From the state of Ms. Evans' knowledge, the injury could have been a temporarily sore finger requiring a temporary change in duties which would not rise to the level of a handicap in obtaining or retaining employment. The Appeals Board, therefore, finds the respondent has not established knowledge of an impairment sufficient to satisfy K.S.A. 1992 Supp. 44-567.

The Appeals Board also concludes the evidence fails to establish a second injury. Dr. Olsen, who diagnosed reflex sympathetic dystrophy, was asked whether claimant's disability or impairment would have occurred had it not been for the initial physical impairment or injury for which he first saw claimant on September 10, 1992, i.e., the injury to the finger. Dr. Olsen answered: "I have no reason to believe that the subsequent injury would have occurred without the original injury." Standing alone, this testimony appears to support respondent's argument. However, Dr. Olsen goes on to explain that reflex sympathetic dystrophy is a condition which, once it has manifested itself, continues to worsen over time. When asked whether the condition on the left was a result of overuse, he indicated he could not arrive at any conclusion on that issue.

Dr. Olsen saw the claimant several times in September and October of 1992 and then did not see her again for approximately a year and one-half. The history he received, when he saw her on the later occasion, indicated she had not been using her hand. The symptoms, nevertheless, had progressed. He found no work activities that he considered to be aggravating or causing the symptoms to manifest themselves bilaterally. Dr. Olsen's testimony indicates the condition was a progressive one and he ultimately indicated he could only say there may have been additional permanent injury resulting from work activities. The evidence does not meet respondent's burden to establish the relationship between the initial injury and a second injury. Dr. Olsen's testimony rather suggests an initial injury which naturally progressed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated November 6, 1995 should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Douglas D. Johnson, Wichita, KS
John F. Hayes, Hutchinson, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director